In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-88

ROBERT R. PHILLIPS, ET AL., PETITIONERS

v.

E. T. KLASSEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 10, 1974. The petition for a writ of certiorari was filed on August 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the offer of temporarily liberalized retirement provisions and a special bonus to employees retiring within a limited period had the effect of illegally

coercing petitioner Greinsky into resigning from the Post Office Department.

2. Whether individuals challenging such resignations must exhaust their administrative remedies.

3. Whether the named petitioners are sufficiently typical of all employees who resigned to take advantage of temporarily liberalized retirement provisions and a special bonus to represent them as a class.

STATEMENT

This case involves the retirement of approximately two thousand Post Office Department headquarters and regional employees in 1971 as the transformation of the Post Office Department into the U.S. Postal Service was taking place. On January 18, 1971, headquarters employees were notified that the advent of the new Postal Service would result in personnel changes varying from "personnel transfers to reduction in grade to job abolishments, or reduction in force" (Pet. App. 2a-3a). On May 12, 1971, in two memoranda to headquarters and regional employees, the Postmaster General described a streamlined reorganization involving the merger of fifteen regions into five, and, in anticipation of major personnel changes, offered a bonus equal to six months' salary to those employees who resigned between May 16 and June 15, and announced a liberalization of retirement policies.

Normally, a federal employee is entitled to retire with an annuity only if he is 55 years of age with 30 years of service, or 60 years of age with 20 years of service, or 62 years of age with five years of service. 5 U.S.C. 8336. However, reduced annuities are available in cases of involuntary separation, except for cause, of employees who are 50 years of age with 20 years of service or who have completed 25 years of service. 5 U.S.C. 8336(d). The Postmaster General invoked a published rule (later en-

acted by Congress, P.L. 93-39, 87 Stat. 73) to permit those who resigned in response to his letter to have their resignations treated as involuntary for purposes of age and service requirements. The Postmaster General stressed that "this letter is not intended to coerce eligible employees to resign and forfeit their retention rights, but is simply an extension of the normal retirement opportunities available to employees" (Pet. App. 5a). By June 15, 1971, 1,884 of the 2,740 postal employees eligible for the bonus and for retirement under the liberalized requirements had retired.

The five named petitioners, each representing a different age and service classification, filed suit on June 14, 1972, on behalf of themselves and all others similarly situated, charging that they had been unlawfully removed from their positions and that their retirements were coerced as a matter of law. Only petitioner Greinsky, however, exhausted his administrative remedies. The district court denied certification of a class action, granted summary judgment against Greinsky, and dismissed the action with regard to the other named plaintiffs (Pet. App. 15a-16a).

The Court of Appeals for the District of Columbia Circuit affirmed (Pet. App. 1a-15a). The court of appeals held that a class action was not proper, and that the individual plaintiffs except for Greinsky had failed to exhaust their administrative remedies. With respect to Greinsky's claim, the court of appeals, noting that prior to his resignation he had signed a statement that he had voluntarily foregone his retention rights, found no evidence that Greinsky's resignation was involuntary except his "after-the-fact assertion to that effect" (Pet. App. 15a).

ARGUMENT

1. Petitioner Greinsky asserts that he was illegally coerced into resigning, and that the resignation was unauthorized (Pet. 9-10). In rejecting the coercion claim, the Civil Service Commission noted, (1) Mr. Greinsky attended a teleconference at which the Postmaster General outlined the liberalization of the retirement policy, (2) he was furnished memoranda and fact sheets explaining the policy, (3) he subsequently sought information from the Personnel Services Section relative to his annuity, and (4) he took a week of annual leave prior to the effective date of his resignation (Pet. App. 18a). Further, he signed a statement that he had "acceded to the Postmaster General's request and have of my own volition foregone any retention rights under reduction in force regulations" (Pet. App. 15a). In these circumstances the courts below properly found the resignation to be voluntary.

Petitioner Greinsky's contention that his resignation was contrary to applicable regulations is unsound. His reliance on the particular requirements of the regulations for reductions in force, 5 C.F.R. 351.402 to 351.404 (Pet. App. 23a-24a) is misplaced because these regulations apply to actual reductions in force and not to resignations in anticipation of such reductions.[1]

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[1] 5 C.F.R. 351.201(a) provides:

> Each agency shall follow this part when it releases a competing employee from his competitive level by separation, demotion, furlough for more than 30 days, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment rights or restoration rights.

Petitioners further assert (Pet. 8) that the Civil Service Commission "rewrote the statute" in allowing resignations submitted upon request in contemplation of a reduction in force to be considered "involuntary" for the purpose of accruing annuities under 5 U.S.C. 8336(d).[2] However, the Civil Service Commission could reasonably interpret a resignation in contemplation of a reduction in force as "involuntary" separation and, indeed, the Commission's interpretation was ratified by Congress. See P.L. 93-39, 87 Stat. 73.

2. Petitioners' second contention that petitioners other than Greinsky should not have been required to exhaust their administrative remedies is invalid. The court of appeals held that exhaustion was required because petitioners sought to "upset administrative actions on a broad basis and to embroil the courts in a sweeping ouster and reinstatement program" without the benefit of the "guidance and mechanisms of the Civil Service Commission" (Pet. App. 12a). The court of appeals' insistence on the exhaustion requirement is consistent with this Court's decisions, *e.g.*, *Sampson* v. *Murray*, 415 U.S. 61; *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279, 296-297, and the requirement was particularly applicable here where resort to the Civil Service Commission might have "generated corrective relief that would have

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[2]In 1971, 5 U.S.C. 8336(d) provided:

> An employee who is involuntarily separated from the service, except by removal for cause on charges of misconduct or delinquency, after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to a reduced annuity.

avoided hardships that would be attendant upon a court decree * * * " (Pet. App. 12a).[3]

3. Petitioners' third contention is that the class action should have been certified. Petitioners implicitly concede that the claims of the named petitioners are not typical of all those who retired to obtain the special bonus, but they assert that any members of the asserted class who would prefer continued retirement to reinstatement may be said to be represented by the defendants (respondents) (Pet. 14) under the rule of *Dierks* v. *Thompson*, 414 F. 2d 453 (C.A. 1). *Dierks,* however, is inapplicable to this case. In *Dierks* the plaintiffs sought the establishment of a trust fund rather than individual cash claims, and the sole issue presented concerned the proper construction of a corporate pension plan. In contrast to *Dierks* which involved only two conflicting groups, in this case there are not simply those who want to be reinstated and those who do not. Those covered by the class asserted by petitioners are in various age and service categories, were to varying degrees likely to be retained in the event of a reduction in force, and were doubtless to varying degrees aware of that likelihood. Thus the court of appeals was correct in concluding that the petitioners did not fairly represent the

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[3]Contrary to petitioners' contention (Pet. 7), the court of appeals decision is not in conflict with *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496 (C.A. 5) and its progeny, *e.g., Barela* v. *United Nuclear Corp.*, 462 F. 2d 149 (C.A. 10). While those cases permitted the maintenance of a class action where only one of the named plaintiffs had exhausted administrative remedies, the claims involved were Civil Rights Act employment discrimination claims and, as the court of appeals in *Oatis* noted, racial discrimination is by definition class discrimination. Whatever application the principles of these decisions may have where the members of the class can be identified by an easily applied objective criterion, they are inapposite here where claims of coercion necessarily involve a particularized inquiry as to each member of the alleged class.

interests of the class of more than 1,500 employees.[4] See *Hansberry* v. *Lee*, 311 U.S. 32, 41-44.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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CARLA A. HILLS,
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[4]The court of appeals also noted the danger that "the theory now proferred in the class action would expose some members of the retired class to a legal liability, to return the bonus, they are not in a factual position to shoulder" (Pet. App. 10a).

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